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No. 99-1908

IN THE
Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL HEALTH LAW PROGRAM, CENTER FOR CONSTITUTIONAL RIGHTS, CENTER FOR LAW IN THE PUBLIC INTEREST AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

STATEMENT OF INTEREST 1

PRELIMINARY STATEMENT 2

SUMMARY OF ARGUMENT 3

ARGUMENT 8

I. The Validity Of The Regulations Is Not Properly Presented In This Case 8

II. The Validity Of The Regulations Has Been Settled 13

III. Settled Statutory Construction Principles Conclusively Establish The Regulations' Validity 19

A. Congress Contemplated Agency Regulations Prohibiting Unjustifiable Discriminatory Effects 20

B. The Regulations Are Reasonable 26

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

Federal Cases

Air Courier Conf. v. *Postal Workers*, 498 U.S. 517 (1991) . 8

Albertson's, Inc. v. *Kirkingburg*, 527 U.S. 555 (1999) 11

Alexander v. *Choate*, 469 U.S. 287 (1985) ..... *passim*

Allegheny County v. *ACLU*, 492 U.S. 573 (1989) 16

Arizona v. *Rumsey*, 467 U.S. 203 (1984) 5

Bazemore v. *Friday*, 478 U.S. 385 (1986) (per curiam) 18, 19

Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983) 8, 30

Boynton v. *Virginia*, 364 U.S. 454 (1960) 11

Batterton v. *Francis*, 432 U.S. 416 (1977) 23

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 14, 24, 30

Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 6, 19, 20, 23, 27

City of Chicago v. *Lindley*, 66 F.3d 819 (7th Cir. 1995) 13

Civil Rights Cases, 109 U.S. 3 (1883) 17

Commodities Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 7, 19, 25

Connecticut v. *Teal*, 457 U.S. 440 (1982) 28, 29

Davis v. *Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) 30

Elston v. Talladega County Bd. of Educ., 997 F.2d 1394 (11th Cir. 1993) 22

FDA v. *Brown & Williamson Tobacco Co.*, 120 S. Ct. 1291, 1313 (2000) 8, 14

Ferguson v. *City of Charleston*, 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S. Ct.1239 (2000) 13

Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 30

Franklin v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992) 2

Gebser v. *Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998) 2, 7, 27, 29

Guardians Ass'n. v. *New York City Civil Serv. Comm'n*, 463 U.S. 582 (1983) ..... *passim*

In re Alabama Employment Discrimination Litigation, 198 F. 3d 1305 (11th Cir. 1999) 22, 29

Irvine v. *California*, 347 U.S. 128 (1954) 12

Kamen v. *Kemper Financial Servs., Inc.*, 500 U.S. 90 (1991) 11

Lau v. *Nichols*, 414 U.S. 563 (1974) 4, 10, 13

Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) 11, 12

Marks v. *United States*, 430 U.S. 188 (1977) 17

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 30

Palmer v. *Thompson* , 403 U.S. 217 (1971) 25

Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) .. 8

Rust v. *Sullivan*, 500 U.S. 173 (1991) 7, 23

Seif v. *Chester Residents Concerned for Quality Living*, 524 U.S. 915 (mem.), *dismissed as moot*, 524 U.S. 974 (1998) 9

Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 16

Steagald v. *United States*, 451 U.S. 204 (1981) 11

Taylor v. *Freeland & Kronz*, 503 U.S. 638 (1992) 12

United States v. *Fausto*, 484 U.S. 439 (1988) 26

United States v. Fordice, 505 U.S. 717 (1992) . 10, 15, 18, 19

United States v. *Guest*, 383 U.S. 745 (1966) 17, 18

United States v. *Morrison*, 120 S. Ct. 1740 (2000) 17, 18

United States v. *O'Hagan*, 521 U.S. 642 (1997) 7, 22

University of California Regents v. *Bakke*, 438 U.S. 265 (1978) 5, 6, 18, 20, 24

Vance v. *Terrazas*, 444 U.S. 252 (1980) 11

Village of Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) 28

Washington v. *Davis*, 426 U.S. 229 (1976) 21, 28

Watson v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988) 3, 29

Zuber v. *Allen*, 396 U.S. 168, 192 (1969) 25

Federal Statutes and Regulations

7 U.S.C. § 12a(5) 7, 20

15 U.S.C. § 775 ..... 5, 14, 26

20 U.S.C. §§ 1681 *et seq.* 5, 14

29 U.S.C. § 794 14

23 U.S.C. § 324 14

42 U.S.C. § 1008 23

42 U.S.C. § 2000d *et seq.* ..... *passim*

43 U.S.C. § 1863 14

49 U.S.C. § 47123 14

Pub. L. No. 89-750, 80 Stat. 1209 (1966) 14

Pub. L. No. 90-247, 81 Stat. 787 (1968) 14

Pub. L. No. 91-230, 84 Stat. 121 (1970) 14

Pub. L. No. 96-88, 93 Stat. 677 (1979) 14

Pub. L. No. 99-506, 100 Stat. 1845 (1986) 14

Pub. L. No. 100-259, 102 Stat. 31 (1988) 14

Pub. L. No. 103-382, 108 Stat. 4026 (1994) 14

28 C.F.R. § 42.104(b)(2) 13

34 C.F.R. §100.3(b)(6)(i) 19

45 C.F.R. § 80.3(b)(3) (1964) 13

Legislative and Administrative Materials

29 Fed. Reg. 16274-16305 (1964) 13, 25

53 Fed. Reg. 2940 (1988) 24

112 Cong. Rec. 18715 (1966) 5

110 Cong. Rec. 6543 (1964) 6, 24

H.R. Rep. No. 829, Pt. 1, 98th Cong.,
2d Sess. 24 (1984) 13

Other Authorities

Comment, 36 GEO. WASH. L.REV. 824 (1968) 13

Laurence H. Silberman,
Chevron – The Intersection of Law & Policy,
58 GEO. WASH. L. REV. 812 (1990) 27

Brief for Petitioner, *Alexander v. Choate*, No. 83-727 16

Brief for Respondent, *Alexander v. Choate*, No. 83-727 ... 16

Brief of United States, *United States v. Fordice*,
No. 90-1205 19

STATEMENT OF INTEREST*

As described in the Appendix to this Brief, *Amici Curiae* are nonprofit law firms, committed to securing the rights to equal treatment and full participation of those subjected to race- and national-origin-based discrimination. *Amici* have represented clients in both administrative and judicial Title VI proceedings, and have a realistic, first-hand understanding of the constructive and important – though limited – role played by private enforcement of regulations such as those involved here.

Various of *Amici* participated, as counsel of record or *Amicus Curiae*, in the earlier cases of this Court that helped give definitive shape to the present Title VI enforcement regime (and those for related civil rights protections), *Alexander* v. *Choate*, 469 U.S. 287 (1985); *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Guardians Ass'n.* v. *New York City Civil Serv. Comm'n*, 463 U.S. 582 (1983); *University of Cal. Regents* v. *Bakke*, 438 U.S. 265 (1978) – as well as in important cases concerning the power and responsibility of the Executive Branch to act against discrimination. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983); *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*), *later proceeding dismissed sub nom. W.E.A.L.* v. *Cavazos*, 906 F.2d 742 (D.C. Cir. 1990). And, on numerous occasions, representatives of *Amici* organizations have been called upon to testify before Congress concerning how best to strengthen Title VI and other civil rights protections.

Amici are committed to preserving the integrity and stability of our Nation's civil rights laws and are concerned by the efforts of Petitioners and their supporting *Amici Curiae* in this case to draw into question – and ultimately unsettle – legal rules that have become a key component of that body of law.

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*Consent to file this Brief has been sought and obtained from both parties. Pursuant to this Court's Rule 37.6, *Amici* attest that no counsel for a party had any role in authoring this Brief and no outside party has made a monetary contribution for its preparation or submission.

PRELIMINARY STATEMENT

The Court has granted a petition for certiorari raising this lone question:

> Whether Congress intended to create a private cause of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress

For the reasons set forth more fully in the Brief of Respondent Martha Sandoval, *et al.*, we believe that question (even as tendentiously formulated) must be answered affirmatively. As the text and structure of the statute make clear, Congress intended Title VI to operate as a coherent whole – with Section 601 stating a basic principle and Section 602 directing those agencies administering federal spending programs to promulgate rules and regulations aimed at carrying forward the anti-discrimination principle in distinct factual settings. See *Alexander* v. *Choate*, 469 U.S. 287, 293-94 (1985). The inescapable import of this Court's decisions is that Congress intended for private enforcement of Title VI rights, see *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 71-72 (1992), and for decades, this Court, Congress, administrative agencies, and federal fund recipients themselves have understood that those subjected to discriminatory practices could file suit, irrespective of whether the rule of decision is supplied by Section 601, by the regulations promulgated to effectuate that provision, or by both. See *Guardians Ass'n.* v. *New York City Civil Serv. Comm'n*, 463 U.S. 582 (1983).

Petitioners have stated no compelling justification for disturbing the settled understanding – one accepted by every federal Circuit to have considered the matter and endorsed by the

Executive Branch – whereby the nature of the alleged violation (purposeful discrimination or its unintended "functional[] equivalent," *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988)), determines the scope of the available remedy, but not the existence of an individual right. See *Guardians*, 463 U.S. at 598 (White, J., announcing judgment of Court) (violations of effects regulations warrant prospective relief only); *Gebser* v. *Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998).

As *Gebser* explained, the appropriateness of the pragmatic approach taken in Justice White's *Guardians* opinion is rooted in the need to reconcile: (1) the conclusion that Congress intended private suits and (2) the fact that Congress did not legislate a detailed roadmap for such enforcement, see 524 U.S. at 284. The framework of the *Guardians* opinion, we respectfully submit, is both more "sensible," *id.*, and more faithful to the statute that Congress enacted than is the substitute that Petitioners would have the Court, at this late date, impose.

SUMMARY OF ARGUMENT

Now that certiorari has been granted on the question of private enforcement, Petitioners (somewhat circumspectly) and their supporting *Amici* (far less abashedly), see Briefs *Amici Curiae* of the Washington Legal Foundation, *et al.* (WLF) and the Pacific Legal Foundation (PLF), *et al.* (collectively, "Legal Foundations"), are pressing the Court to effect an even more drastic break with settled law. They propose that this case be used to reconsider decisions affirming the legality of agency regulations proscribing fund recipient practices that operate, unjustifiably, to discriminate against members of racial and ethnic minority groups. See *Choate*, 469 U.S. at 293-94 ("[a]ctions having an unjustifiable disparate impact on minorities [may] be redressed through agency regulations designed to implement the purposes of Title VI"); *Guardians*, 463 U.S. at 584 & n.2 (White, J., announcing judgment of the Court); *Lau*

v. *Nichols*, 414 U.S. 563, 570 (1974) (Stewart, J., concurring).

For the reasons set forth below, this case is no occasion for the Court to reconsider, let alone repudiate, what has become the settled understanding of Title VI. At the outset, Petitioners stand in an unusually weak position from which to argue that the validity of the regulations should (let alone, must) be addressed. Not only did Petitioners accept federal grants on the express understanding that they would be bound by the regulations, but they did not seek to raise the issue of validity in the courts below – or even in their petition for certiorari to this Court. Indeed, as recently as in the petition for certiorari, Petitioners gave every indication that they accepted that the validity question had long been resolved, in favor of the regulations. Although the power of this Court is not confined to addressing questions properly preserved and fairly presented in certiorari petitions, departures from those prudential limitations remain the rare exception. Indeed, if the validity issue is as important and ubiquitous as the Petitioners and their supporters would have the Court believe, there is that much less reason for the Court to stretch the Rules in order to resolve it here.

There is a second, more fundamental basis for resisting Petitioners' invitation: the consistency between regulation and statute has already been considered and decided – correctly – by this Court. As is explained below, the Legal Foundations' efforts to re-cast as "dictum" what this Court (and many others) has described as "holding," see *Choate*, 469 U.S. at 293, fall short by their own terms. The affirmative rulings on validity were an integral part of the Court's reasoning in *Choate*, *Guardians*, and *Lau*, and an approach that casts aside as "dictum" any legal conclusion arrived at in a case that could have been decided on more narrow grounds unduly slights the strong interest in the stability and orderly development of the law.

But even to engage in the doubtful parsing of concurring

opinions that the Legal Foundations urge risks obscuring a more basic fact: the validity of these regulations (and countless others modeled on them) has been a first principle of federal civil rights law for a generation. Billions, if not trillions, of dollars have been appropriated on the understanding that recipients would operate in conformity with their mandate (with recipient entities, like Petitioner, willingly agreeing to abide by them). Proposals to curb these regulations have never succeeded in Congress, see, *e.g.*, 112 Cong. Rec. 18715 (1966) (rejecting proposal to amend Title VI so as to require proof of "intent to exclude"), and on more than one occasion, Congress (in whose name, presumably, the regulations would be struck down) has revised – and expanded – Title VI with full awareness of what they require.

Congress has also, over time, passed major civil rights laws explicitly modeled on Title VI – both the Section 601 prohibition and the Section 602 effectuating regulations, see, *e.g.*, 20 U.S.C. §§ 1681, 1682. In fact, dozens of federal statutes have expressly directed agencies to promulgate regulations "similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964," see, *e.g.*, 15 U.S.C. § 775.

Finally, not only is it impossible for Petitioners and their *Amici* to articulate the sort of "special justification," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), ordinarily required for unsettling so long- and widely-accepted a statutory and regulatory regime, they do not even clear the very first hurdle – showing that the Court's decisions affirming the validity of the regulations were in error. On the contrary, the argument against the regulations' validity reduces to a single, flawed premise: that because the prohibition of Section 601, by its own force, reaches only purposefully discriminatory practices, see *University of Cal. Regents* v. *Bakke*, 438 U.S. 265, 287 (1978) (Opinion of Powell, J.) (1978); *id.* at 328 (Brennan, J., concurring in part and dissenting in part), it necessarily follows that Congress intended

to withhold from the Section 602 delegation of "effectuating" authority the power to promulgate discriminatory results regulations.

But that is not the best – let alone the only – interpretation of those statutory provisions. The Legal Foundations do not point to affirmative evidence from the text or legislative history that Congress specifically decided that "effectuating" regulations could not incorporate a results standard, see *Chevron USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Both the text and the legislative history fully support the contrary construction of the statute endorsed, unanimously, in *Choate*: *i.e.*, that the Section 602 delegation comprehends, among other things, the power to determine, in the first instance, "what sorts of disparate impacts upon minorities constitute[] sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." 469 U.S. at 294. Under any circumstances, the hypothesized antipathy to disparate impact standards seems implausible from a Congress concerned that "public funds * * * not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination," 110 Cong. Rec. 6543 (Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963). And the fact that the same Executive Branch agencies which helped draft the language of Title VI were involved in promulgating the 1964 regulations containing "effects" language substantially indistinguishable from what is questioned here profoundly undermines, if it does not foreclose, arguments that the regulations contravened specific congressional intent.

In fact, the primary authority cited for the proposition that Section 601 does not by its own force proscribe disparate impacts is *Bakke*, where five Justices arguably embraced that construction. But four of those five Justices expressed that view

in an opinion that expressly and repeatedly endorsed the validity of agency regulations requiring more of recipients than does the Constitution. 438 U.S. at 344 (Brennan, J., concurring in part); see also *id.* at 284 (Powell, J.) (noting that term "discrimination" is not unambiguous).

To the extent that Petitioners and *Amici* insist that regulations, generally, may not reach conduct that "goes beyond" what the provision being "effectuated" would, of its own force, proscribe, they are not correct. See, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997). To the extent that they would argue that impact regulations are, as a matter of law, an unreasonable means of "effectuating" a provision prohibiting intentional discrimination, they cannot meet the heavy burden the law imposes. See, *e.g. Commodities Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986) (court must defer "when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes'" of a statute) (quoting 7 U.S.C. § 12a(5)). Although this Court's cases are clear that the impact and intent standards are not one and the same, its decisions have just as frequently acknowledged the substantial convergence between the two theories, and even where effects regulations reach practices that would survive scrutiny under a different test, they plainly can – and do – "effectuate" a prohibition on purposeful discrimination.

By conditioning the receipt of federal funds on a pledge to refrain from unjustifiable impacts, the regulations assure: (1) that tax dollars do not support well-concealed intentional discrimination; (2) that federal dollars do not reinforce harms caused by intentional discrimination (either by the recipient or other actors); (3) that those who might otherwise engage in intentional discrimination on race and/or national origin are deterred; and (4) they help avoid polarizing accusations of invidious motives, see *Gebser*; cf. *Rust* v. *Sullivan*, 500 U.S. 173,

188 (1991) (restrictive rules are reasonable means of preventing "the public * * * impression that Federal funds are being improperly used").

Even if the sundry forecasts of "undesirable" consequences, WLF Br. at 22, had more substance, however, several broad considerations would still strongly support validity. The regulations deal with a subject matter, racial and ethnic discrimination, where the federal government's powers are at their zenith, and where the special leadership role of the Executive Branch repeatedly has been recognized, see *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Moreover, while they have the force and effect of law, the regulations are binding only on those entities, like Petitioners here, that decide the "burden" imposed is one worth bearing.

Finally, this Brief almost surely understates the myriad ways in which the passage of time and intervening events (including this Court's endorsements, whether in "holding" or "dictum") must inform any appraisal of reasonableness. See *FDA v. Brown & Williamson Tobacco Co.*, 120 S. Ct. 1291, 1306 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989).

ARGUMENT

I. The Validity Of The Regulations Is Not Properly Presented In This Case

Notwithstanding the mild protestations of the Petitioners and the vigorous exertions of their *Amici*, the question of the validity of the disparate impact regulations has not properly been presented in this case. It was not raised by Petitioners in the courts below, nor was it presented in their petition for certiorari. Under this Court's Rules and precedents, neglect to preserve a

legal issue ordinarily will preclude its consideration, see, *e.g.*, *Air Courier Conf.* v. *Postal Workers*, 498 U.S. 517, 522 (1991), and there is no cause to depart from the settled rule here.

At the outset, the single question presented in the petition for certiorari – as formulated by Petitioners – gives absolutely no indication of any quarrel with the regulations' validity. To the contrary, the question refers, in strictly neutral terms, to "regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964," indicating disagreement only with the Eleventh Circuit's conclusion as to the means by which those regulations may be enforced, see petition at i (questioning whether the Appeals Court was correct to allow Respondents to "bypass the federal agency review process" where noncompliance is alleged).

This reading of the question presented receives strong confirmation from the section of the petition titled "Reasons for Granting the Writ," which describes the case as presenting "an important question of federal law that this Court has not yet resolved," *id.* at 5, namely "whether Congress intended to create a right of action * * * that would permit private citizens to enforce the terms of Title VI regulations that are incorporated in federal grants."[1] In fact, the only sustained discussion of the validity of the regulations can be found on page 15, which says:

> In *Guardians*, the Court affirmed the denial of compensatory relief to plaintiffs in a Title VI lawsuit, reaching two conclusions as it did so. First, seven members of the Court agreed that proof of discriminatory intent was required to establish a violation of Title VI.

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[1] See also *id.* at 7-8 (noting that the "only issue" in the *Seif* [v. *Chester Residents Concerned for Quality Living*, 524 U.S. 915, *dismissed as moot*, 524 U.S. 974 (1998)] case was whether plaintiffs had a "right to sue").

> Second, five members joined "to form a majority for upholding the validity of the regulations incorporating a disparate-impact standard." In *Alexander* [v. *Choate*], this Court confirmed this reading of *Guardians*.

Id. at 15 (citations omitted). Indeed, Petitioners underscored the word "validity."

The understanding that certiorari was being sought only with respect to the private enforceability of the regulations, and not their validity, draws further support from the Eleventh Circuit's decision, appended to the Petition, which discusses the agency's authority to promulgate the regulations in a single sentence, presenting it as settled law, see Pet. App. 35a.-36a, and notes that Petitioners "concede that [they are] subject to such regulations" by virtue of receiving federal funds. *Id.* Compare WLF Br. at 11-12 (arguing that the appellate court "understood" Petitioners to be challenging the validity of the regulations).[2] And while their *Amici* have spun out a scenario whereby a single, opaque sentence in Petitioners' Eleventh Circuit brief should be construed as raising the validity issue, that creative interpretation must be weighed against the forthright statement, in that same brief, that "the Court [in *Guardians*] upheld the validity of the regulations." Brief of Appellants, at 27-28.

Finally, if the Eleventh Circuit were wrong – as the Washington Legal Foundation now seems certain it was – to have

[2]As support for their argument that the court "fully considered and rejected arguments" about the regulations' validity, see WLF Br. at 12, *Amici* point to a footnote in the Eleventh Circuit's opinion rejecting Petitioners' argument "that the Supreme Court in *United States v. Fordice* overruled *Guardians* and *Lau*." See Pet. App. 47a n.24. This statement, however, is found in the court's discussion of the private enforcement issue, not validity, and Petitioners' brief before the Eleventh Circuit similarly raised the implications of *Fordice* for *Guardians* and *Lau* only in that connection. See Brief of Appellants at 29.

treated the issue of validity as conceded by Petitioners – Petitioners might have been expected to have included in their Petition for Rehearing and Suggestion of Rehearing *En Banc* some protest that they had not conceded what the appellate decision had understood them not to challenge. No such objection appears therein.

While Petitioners' *Amici* correctly note that this combination of "assertions, concessions, and acquiescence" *Steagald* v. *United States*, 451 U.S. 204, 211 (1981), does not deprive the Court of the power to decide questions beyond the scope of those raised in accordance with the Rules (or divest it of the duty to do so where jurisdiction is involved), the validity issue is not jurisdictional, and this is surely not an instance where the Court might opt to resolve a less broadly significant, nonconstitutional issue, so as to avoid ruling on a constitutional question presented by the parties, see, *e.g.*, *Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960).

Thus, while *Amici* insist that "'intelligent resolution'" of the private enforcement question requires consideration of the validity issue, on the ground that no right could exist to enforce an invalid regulation, see WLF Br. at 11 (quoting *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n.5 (1980)), it is not unusual for the Court to assume, for purposes of resolving other questions, that particular regulations are valid, see *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 563 n.10 (1999) (assuming validity of ADA regulations); *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (assuming, without deciding, the existence of a private cause of action under a statute, because the question was not within those on which certiorari was granted). And the Court's cases clearly teach that the fact that an issue is "logically anterior" to a properly presented question does not in itself establish that it must be considered. *Lebron* v. *National R.R. Passenger Corp.* 513 U.S. 374, 406 (1995) (O'Connor, J., dissenting) (collecting cases).

Although the rules against considering issues not raised are prudential, rather than iron-clad, the reasons for applying them are, as the Court has explained, compelling: "[A]llowing the able counsel who argue before us to alter * * * questions or to devise additional questions at the last minute would thwart" the "integrity of the process of certiorari" *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992). Not only is "the practice of smuggling additional questions into a case after we grant certiorari," *Irvine* v. *California*, 347 U.S. 128, 129-30 (1954) (Jackson, J., concurring), unfair to the opposing party – who must choose between (a) maintaining silence on the issue, as a matter of principle, but thereby risking an adverse resolution, and (b) briefing it and being told that he thereby forfeited the right to complain – but doing so risks unfairness to those petitioners who, following the Court's Rules, forthrightly present the questions they want the Court to decide. See generally *Lebron*, 513 U.S. at 406 (O'Connor, J, dissenting).

As *Amici*'s drumbeat warnings of impending litigation only serve to underscore, declining to decide the validity issue in this case would not impair the Court's ability to address the issue on some other occasion (if, indeed, further ventilation of the matter is necessary), and there is nothing remotely unfair about holding this litigant to the Court's well-established rules. There is no claim here of a late-breaking legal or factual development that could explain why issues that Petitioners would now have the Court decide could not have been raised at earlier stages of this case. Very much to the contrary, Petitioners knew about the regulations even before any litigation commenced: indeed, the Department of Public Safety signed a contract expressly agreeing to be bound by those regulations, see Pet. Br. at 11, and its own pre-implementation internal memoranda raised concern that the practice of linking driving privileges to English language proficiency would run afoul of those regulations.

II. The Validity Of The Regulations Has Been Settled

In asking the Court to invalidate the Title VI regulations, Petitioners' *Amici* are not merely pressing an issue that was not carefully preserved in this case. They are asking the Court to disturb an understanding of the law that has been settled since the enactment of Title VI more than three decades ago. The very first regulations promulgated under Title VI – drafted by the same executive branch officials who had played a key role in drafting the statute, see Comment, 36 GEO. WASH. L. REV. 824, 845-46 (1968) – contained "effects" language that is, in relevant respects, indistinguishable from the regulations implicated in this case, see 29 Fed. Reg. 16274-16305 (1964),[3] and in three decisions, this Court specifically considered and affirmed the validity of the Title VI regulations. See *Choate*, 469 U.S. at 293; *Guardians*, 463 U.S. at 584 n.2; *Lau*, 414 U.S. at 569.

Those decisions have been read, correctly, by the Courts of Appeals, as having resolved the validity of the regulations, see, *e.g.*, *City of Chicago* v. *Lindley*, 66 F.3d 819, 828 (7th Cir. 1995); *Ferguson* v. *City of Charleston*, 186 F.3d 469, 479 n.10 (4th Cir. 1999), *cert. granted on other grounds*, 120 S. Ct.1239 (2000), and their precepts – well known to Congress, H.R. Rep. No. 829, Pt. 1, 98th Cong., 2d Sess. 24, 33-35 (1984), the Executive branch, and recipients of federal funds themselves – have influenced the enactment and interpretation of numerous other statutes and shaped civil rights protections for a generation.

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[3]The only difference between the regulation at issue here, 28 C.F.R. § 42.104(b)(2) (2000), and one promulgated in 1964, see 45 C.F.R. § 80.3(b)(3) (1964) (HEW), is that the Justice Department regulation forbids "utiliz[ation of] criteria or other methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin") (emphasis added), while the earlier one reads "as respect [such] individuals").

Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts"). Not only has Congress amended Title VI seven times since its inception without ever indicating disapproval,[4] but it has expressly modeled major pieces of civil rights legislation on the Title VI framework, see 20 U.S.C. § 1681 *et seq.* (Title IX); 29 U.S.C. § 794 (Rehabilitation Act). No less important are the numerous statutes specifically directing the Executive branch to promulgate regulations, aimed at deterring and remedying gender discrimination for example, that track those whose validity the Legal Foundations would have this Court invalidate, as inconsistent with congressional intent. See, *e.g.*, 15 U.S.C. § 775 ("This provision will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964"); 23 U.S.C. § 324 (same); 43 U.S.C. § 1863 (same); 49 U.S.C. § 47123.

In their Briefs *Amici Curiae*, the Legal Foundations ask the Court to treat as legally immaterial this decades-long record of judicial approval and legislative endorsement – and treat the validity question as an "open" one. That approach to statutory construction is in tension with the recent teaching of this Court, see, *e.g.*, *Brown & Williamson*, 120 S. Ct. at 1306 (looking to "legislation that Congress has enacted over the past 35 years"). Indeed, even were it appropriate to engage in the hair-splitting re-reading of prior opinions that *Amici* insist is demanded here, their arguments would fail.

The first burden of the Legal Foundations' argument is to demonstrate the supposed insignificance of the Court's

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[4]See 80 Stat. 1209; 81 Stat. 787; 84 Stat. 121; 93 Stat. 677, 692; 100 Stat. 1845; 102 Stat. 31; 108 Stat. 4026.

unanimous opinion in *Choate*, which offered a description of – and a rationale for – what it identified as the holding of the Court in *Guardians*. The earlier decision, *Choate* explained,

> held * * * that Title VI itself directly reached only instances of intentional discrimination [but also held] that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI [and that] * * * Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

469 U.S. at 293-94. According to the Legal Foundations, this explicit affirmation of the validity of the regulations is inconsequential here, on the grounds: (1) that it represents "dictum" – because the *Choate* case arose under the Rehabilitation Act, rather than Title VI – (2) that it is inaccurate in characterizing the precedential force of *Guardians*; and (3) that it was overruled *sub silentio* in a footnote in the Court's subsequent opinion in *United States* v. *Fordice*, 505 U.S. 717, 732 n.7 (1992).

To begin with, the pertinent part of the *Choate* opinion is not readily described as "dictum." Although *Amici* blithely suggest that *Choate* "had nothing to do with Title VI," WLF at 16; see PLF Br. at 9, the Court's exegesis of Title VI came in the course of considering the primary argument raised by the petitioner in that case: *i.e.*, that because Congress had modeled the Rehabilitation Act on Title VI (and because Title VI had been interpreted, it argued, as foreclosing regulation of all but purposeful discrimination), a regulation that reached beyond "purposeful discrimination against the handicapped" could not be

sustained. See Brief for Petitioner, No. 83-727, at 12.

The *Choate* Court explained that the petitioner's argument rested on an incorrect premise: to the (limited) extent that Title VI and the Rehabilitation Act should be read *in pari materia*, see *id.* at 293 n.7, the Court reasoned, that parallel was not helpful to the State's case. To the contrary, *Choate* continued, "Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination." *Id.* at 295 n.11.

Although the Court went on in that case to endorse the petitioner's narrower arguments, *i.e.*, that the particular disparate impact regulations under which plaintiffs had sued did not entitle them to relief, that fact does not make the Court's resolution of the broader issues less authoritative. When an opinion issues for the Court, "the principle of stare decisis directs [that courts] adhere not only to the holdings of * * * prior cases, but also to their explications of the governing rules of law." *Allegheny County* v. *ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part); see also *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996) ("We adhere in this case, however, not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions").

The Legal Foundations' insistence that the Court substitute their proffered understanding of the *Guardians* decision for the description subscribed to by the unanimous Court in *Choate* – *i.e.*, casting Justice White's opinion as "*dictum*" – is no more persuasive. The meaning of *Guardians* was extensively and adversarially briefed in *Choate*, see, *e.g.*, Brief for Respondents, No. 83-727 at 5, 7, 12, 16, 32, 47. And the *Choate* decision, handed down two Terms after *Guardians*, was frank in summarizing the points of division among the

opinions in the earlier case.

In fact, *Choate*'s explanation of *Guardians* is consistent with the rule that when no single opinion commands the adherence of a majority of the Court, the holding of a case will be deemed to be "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (citation omitted). There can be no disputing that Justice White, who concluded both that there was a private right of action under Title VI, 463 U.S. at 595, and that the valid regulations entitled plaintiffs to relief – but who ultimately voted to affirm on the ground that the regulations entitled plaintiffs to no more relief than they had been granted on their Title VII claim, *id.* at 604-07 – authored the opinion that concurred in the judgment on the narrowest ground. Indeed, Justice White would never have reached the question of appropriate relief had he not concluded, along with four other Justices, that the plaintiffs had a valid entitlement to seek some relief under the impact regulations.[5]

The Legal Foundations' efforts, see, *e.g.*, PLF Br. at 7, to tar Justice White's careful examination of the Title VI questions presented in *Guardians* with the same brush that this Court recently used, see *United States* v. *Morrison*, 120 S. Ct. 1740, 1757 (2000), in disapproving of *dicta* in *United States* v. *Guest*, 383 U.S. 745 (1966), which had purported to overrule *The Civil Rights Cases*, 109 U.S. 3 (1883) – are to say the least,

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[5] *Amici*'s aversion to adding together votes from concurring and dissenting opinions does not appear to be too thoroughgoing: see WLF Br. at 14 (asserting that "[s]even Justices agreed that no Title VI cause of action could be established in the absence of evidence of intentional discrimination"); *id.* at 13 (relying on separate opinions of Justices Powell and Brennan in *Bakke*; PLF Br. at 7, 10 (same).

strained.[6] Not only did Justice White's opinion announcing the judgment of the Court address a (non-constitutional) question that was squarely presented in *Guardians*, it (unlike the *Guest* concurrence) did so in a manner that sought to preserve, and not overrule, prior precedent.[7]

Finally, the Court of Appeals plainly was right – and Petitioners' *Amici*, wrong – concerning the significance *vel non* of the *Fordice* footnote. *See* PLF Br. at 11 (asserting that Court of Appeals ignored the "rule articulated by * * * *Fordice*"). As

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[6]As *Morrison* explained, the "naked dicta," 120 S. Ct. at 1757, of the *Guest* concurrence was "'extraordinary,'" (quoting 383 U.S. at 762)(Harlan, J., concurring in part) – because the concurring Justices had expressly acknowledged that the question they purported to address, that of Congress's power to reach purely private conduct under § 5 of the Fourteenth Amendment, was not, in fact, present in the case before them. *Morrison* explained that to give precedential weight to such dictum – and treat it as overruling century-old authority – is "not the way that reasoned constitutional adjudication proceeds." 120 S. Ct. at 1757.

[7]Although seven Justices in *Guardians* had concluded that one holding of *Lau v. Nichols* could not be reconciled with the various *Bakke* opinions – *Lau*'s conclusion that a Section 601 violation could be established without proof of invidious purpose – Justice White explained that nothing in *Bakke* supplied a basis for impugning the alternative holding of *Lau* – that the Title VI discriminatory effects regulations were valid, irrespective of whether Section 601 would, of its own force, reach unintentional discrimination. 463 U.S. at 591.

As Justice White also noted, 463 U.S. at 590, the language in Justice Brennan's *Bakke* opinion – which he had joined – was itself broader than had been necessary to decide that case. The statutory question presented in *Bakke*, *i.e.*, whether Congress intended Title VI to prohibit the sort of racial classifications that would be permissible under the Equal Protection Clause, surely did not require the Court to decide when and whether Title VI reaches practices that do not classify, but operate, unintentionally, to the unnecessary and disproportionate disadvantage of racial minority groups.

even the Legal Foundations recognize, that case arose in a setting – desegregation of public education – where the Fourteenth Amendment has been construed to apply a unique set of affirmative duties. See *Fordice*, 505 U.S. at 731-32 (distinguishing *Bazemore* v. *Friday*, 478 U.S. 385 (1986) (*per curiam*)); WLF Br. at 20 (arguing that *Fordice* "can properly be characterized as a disparate impact case"). Thus, the Court's conclusion that the generic "affirmative action" desegregation regulation, 34 C.F.R. §100.3(b)(6)(i), should be interpreted as coextensive with the Constitution – which was the position advanced by the responsible administrative agency, see Brief of United States No. 90-1205 at 42 – is not remotely equivalent to a holding that an agency could not promulgate a regulation imposing a duty beyond what the Constitution (or Section 601) has been construed to require. See also *Bazemore*, 478 U.S. at 408-09 (White, J., concurring) ("Petitioners rely on the Department of Agriculture regulation requiring * * * 'affirmative action' to overcome the effects of prior discrimination in its programs. But * * * it is the position of * * * the federal parties that there has been full compliance with the regulation. In view of the deference due the Department's interpretation of its own regulation, we cannot accept petitioner's submission that the regulation has been violated").

III. Settled Statutory Construction Principles Conclusively Establish The Regulations' Validity

But even if the question of the regulations' validity were properly presented in this case, and even if the issue could, in any sense, be treated as a matter of first impression, straightforward application of basic administrative law principles would defeat the Legal Foundations' arguments. Federal courts are obliged to give effect to those agency regulations which: (1) do not contravene congressional resolution of a specific issue and (2) are reasonable. See *Chevron* 467 U.S. at 842-43 (1984). The regulations at issue here satisfy both requirements. See generally

Schor, 478 U.S. at 845 (deference is required "when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing") (quoting 7 U.S.C. § 12a(5)).

A. Congress Contemplated Agency Regulations Prohibiting Unjustifiable Discriminatory Effects

Although presented in a variety of guises, the arguments against the regulations' validity largely boil down to an assertion that the decisions in *Bakke* and *Guardians* -- to the extent they construed Section 601's prohibition of "discrimination" as entirely coextensive with that of the Equal Protection Clause – necessarily foreclose promulgation of agency regulations that forbid recipients from engaging in practices that have unintentional, unjustifiable discriminatory results. See WLF Br. at 19 (quoting *Guardians*, 463 U.S. at 613-15 (O'Connor, J., concurring in judgment)). According to Petitioners and *Amici*, because Congress "intended Title VI not apply in any instance in which there is no evidence of intentional discrimination" or because the 88th Congress "made permissible by statute" or "authorize[d]" "State action that disproportionately affects an identifiable group on the basis of national origin," it is inconceivable that it would simultaneously "permit an executive-branch agency to ban such conduct," Pet. Br. at 26 (emphasis in original).

In so arguing, however, Petitioners and the Legal Foundations simply assume what the law requires them to prove: that Congress affirmatively and specifically decided to exclude promulgation of discriminatory effects regulations from the "effectuating" measures that agencies were authorized – and directed – to promulgate. See *Chevron*. Nothing in the statutory text compels that reading of Sections 601 and 602, and other

statutory construction tools conclusively establish the opposite.

Even when Section 601 is understood as proscribing discriminatory intent only, see *Guardians*, 463 U.S. at 591 (noting number of Justices who believed that *Bakke* so held), it does not follow necessarily that Congress affirmatively intended to license – or fund – practices, no matter how extreme or unnecessary the exclusionary effects. The language of Sections 601 and 602 is equally plausibly read, as it was by the Court in *Choate*, as enacting a government-wide minimum, while delegating "to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts" – or, simply as leaving it to the Executive Branch to take what measures it deemed reasonable or necessary to effectuate the Section 601 prohibition. There is no logical inconsistency between a legislative decision to forbid funding of intentional discrimination government-wide and a delegation to agencies of the power to withhold funds from (certain) practices that are the "functional equivalent" of intentional discrimination.

Indeed, the case widely cited as establishing the central importance of intent inquiry in Equal Protection analysis, *Washington* v. *Davis*, 426 U.S. 229 (1976), supports, rather than contradicts, the legislative approach described in *Choate*. Although the Court's opinion in that case expressed concern about the consequences of constitutionalizing disparate impact analysis, *Davis* can not be read as suggesting that disparate impact analysis is universally inappropriate – or incompatible with the constitutional command. Instead, just as the 88th Congress delegated to administrative agencies the responsibility for determining in the first instance whether and what sort of disparate impact analysis is needed, *Washington* cited with approval statutory settings in which Congress had enacted a

disparate impact standard, indicating that extensions of the principle should be a matter of political, rather than judicial, "prescription." 426 U.S. at 248.[8]

To the extent that the Legal Foundations ground their argument on a general "principle" that a provision can never be "effectuated" by regulations that prohibit conduct that it does not itself outlaw, they are not on firm ground. The Court rejected precisely that argument in *United States v. O'Hagan*, 521 U.S. 642, 673 (1997), which affirmed that Security and Exchange Commission Rule 14-e-3(a), requiring disclosure of trading based on nonpublic information concerning tender offers, was a permissible exercise of regulatory authority conferred by Congress.

Noting that the SEC had been vested with power both to "'define' and 'prescribe means reasonably designed to prevent' 'acts and practices' which are 'fraudulent,'" the Court rejected arguments that the regulation had "redefined" "fraudulent" and "manipulative," giving them broader effect than had controlling judicial constructions. Whether or not the imposition of the new duty was a permissible exercise of the Commission's delegated authority to "define," the Court explained,"Rule 14e-3(a) * * * could be sustained as a 'means reasonably designed to prevent' fraudulent trading on material, nonpublic information in the

[8]The intensity of judicial scrutiny that a contrary ruling in *Davis* would have triggered is different in kind from what has been applied under Title VI. See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) (any practice with "substantial legitimate justification" is presumptively legal under Title VI); *In re Alabama Employment Discrimination Litigation*, 198 F. 3d 1305, 1322 (11th Cir. 1999) (defendant's showing in Title VII impact case is "on an entirely different evidentiary planet than demonstrating a compelling interest; it is a rare day, indeed, that courts find government actors to have adequately demonstrated a compelling interest, and a rarer one still that courts find no less restrictive alternative available").

tender offer context." According to the Court,

> A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited. * * * * * § 14(e)'s rulemaking authorization gives the Commission "latitude," even in the context of a term of art like "manipulative," "to regulate nondeceptive activities as a 'reasonably designed' means of preventing manipulative acts, without suggesting any change in the meaning of the term 'manipulative' itself." We hold, accordingly, that under § 14(e), the Commission may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is "reasonably designed to prevent ... acts and practices [that] are fraudulent."

Id. at 672-73 (citations omitted); see also *id.* ("Because Congress has authorized the Commission, in § 14(e), to prescribe legislative rules, we owe the Commission's judgment more than mere deference or weight * * * * we must accord the Commission's assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'") (quoting *Batterton v. Francis*, 432 U.S. 416, 424-26 (1977) and *Chevron*, 467 U.S. at 844).

Rust v. Sullivan, 500 U.S. 173 (1991), is to similar effect. There, the Court held, *inter alia*, that the statutory provision forbidding recipients of federal family planning support to expend federal funds on abortion-related counseling, 42 U.S.C. § 1008, supplied authority for a regulation requiring recipients to maintain separate facilities, personnel, and records for their federally-funded and abortion-related activities. Although there was no suggestion that Congress had intended for such complete separation (and substantial, if inconclusive, evidence of a contrary intention), the Court accepted the Secretary's explanation that, absent such separation, the "distinction

between the recipients' title X and other activities may not be easily recognized, [and] the public can get the impression that Federal funds are being improperly used for abortion activities." *Id.* at 188 (quoting 53 Fed. Reg. 2940 (1988)) (emphasis supplied).

But not only is the Legal Foundations' proposed reading of Title VI not the only interpretation of Congress's intention, it is by far the least plausible of the available alternatives. First, even if *Bakke* is read as holding that Congress intended that the Section 601 prohibition would track the "constitutional" (discriminatory purpose) standard under all circumstances, see 438 U.S. 265, 287 (Opinion of Powell, J.) (1978); *id.* at 328 (Brennan, J., concurring in part and dissenting in part), that decision cannot be bootstrapped into an affirmative intent to disallow effects regulations. To the contrary, four of the five Justices whose votes in *Bakke* are invoked as establishing the "intent" reading of Title VI signed an opinion that repeatedly and approvingly referred to the existing regulations, including ones that indisputably went beyond the prohibitory force of the Equal Protection Clause. See, *e.g.*, 438 U.S. at 344. Moreover, the repeatedly expressed congressional concern that public funds "not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination," see, *e.g.*, 110 Cong. Rec. 6543 (Sen. Humphrey) hardly suggests a manifesto against disparate impact analysis, let alone an affirmative directive that agencies fully fund recipient activities that this Court has called "functionally equivalent" to purposeful discrimination.

The "contemporary legal context," *Cannon*, 441 U.S. at 699, renders even more implausible the notion that the 88th Congress specifically intended to withhold authority to promulgate "effects" regulations from the power conferred by Section 602. When Congress first set about prohibiting "discrimination" under Section 601 – and authorizing

administrative agencies to effectuate that directive – the distinction between intent and impact was not a central feature of Equal Protection doctrine. To the contrary, leading decisions of this Court suggested that impact alone sufficed to establish a constitutional violation, and decisions such as *Palmer* v. *Thompson*, 403 U.S. 217, 224-25 (1971), indicated that analysis of legislative motive was strongly discouraged.

In point of fact, it is not merely that traditional statutory construction aids fail to support the suggestion that Congress intended to foreclose 602 regulations incorporating the effects test. Rather, the text, structure, and history of Title VI strongly suggest that regulations of the sort resisted here are precisely what Congress contemplated when it delegated "effectuating" authority. See *Schor*, 478 U.S. at 847 (courts should not "reject plain evidence of congressional intent because that intent was not specifically embodied in a statutory mandate").

To begin with, the statutory text and structure make plain – and the legislative history confirms – that Congress intended for administrative rulemaking to play a central part in the Title VI scheme. By its terms, the statute does not merely authorize effectuating regulations – it "directs" their promulgation (and subjects them to presidential approval), and the remedies provided in the text of the statute are triggered by noncompliance with "any requirement adopted pursuant to [Section 602]." 42 U.S.C. 2000d-1. The reticence of Title VI's congressional supporters to enact a single, textual definition of "discrimination" has itself been explained in terms of preserving administrative "flexibility," *Bakke*, 438 U.S. at 339 (Brennan, J.).

Against this background, it is especially significant that the Executive Branch, which played a central role in drafting the language of Title VI and the first set of agency regulations, included "effects" prohibitions indistinguishable from those the Foundations would now have the Court hold unauthorized. See

29 Fed. Reg. 16274-16305 (1964) (regulations of seven agencies, all including disparate impact rules); *Zuber v. Allen*, 396 U.S. 168, 192 (1969) (interpretation of a statute by administrators who participated in drafting it carries "most weight"). While legislative inaction is not always the most reliable interpretive guide, it would betray an "awkward frame of mind," Pet. Br. at 26, if Congress had intended that federal agencies not include "discriminatory effects" regulations among those they were directed to promulgate, yet sat idly by as almost every agency of the United States government contravened this supposedly specific intent.

Finally, as noted above, the thirty-five years since promulgation of the first disparate impact rules have been unusually rich in explicit and implicit congressional endorsements of those regulations. The multiplicity of statutes expressly directing federal agencies to promulgate "provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964," see, *e.g.*, 15 U.S.C. § 775, combined with amendments of Title VI itself enacted with full knowledge of the (judicially approved) administrative construction, and still other legislation consciously intended to incorporate the Title VI model, requires that Section 602 be construed as authorizing the regulations. *Fausto*, 484 U.S. at 453 (even if a statute "may have a range of plausible meanings" when first enacted, "the implications of a statute may be altered by the implications of a later statute").

B. The Regulations Are Reasonable

The burden of persuading a court to reject as "unreasonable" an agency's judgments – pursuant to expressly delegated authority – concerning what rules and requirements will effectuate a statutory provision entrusted to its administration is a heavy one under any circumstances, and that

difficulty must be exponentially greater in a case such as this one, where the regulations challenged were contemplated by the legislature; where they have remained unchanged for decades; and where they have received the explicit endorsement of this Court and numerous subsequent Congresses. Cf. Laurence H. Silberman, *Chevron – The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 812, 828 (1990) (when "legislation comes rather near to authorizing directly the agency's order under review * * * * the second step is rather easy: the agency's interpretation is almost surely permissible").

In essence, Petitioners and *Amici* claim: (1) that the constitutional and impact standards are so inimical that the regulations cannot fairly be described as "effectuating" congressional objectives; and (2) that the consequences of the disparate impact regulations are so intrusive and "undesirable," WLF Br. at 22, as to require (belated) judicial invalidation. These criticisms are neither accurate nor sufficient to support the extraordinary step the Court is asked to take.

At the outset, the "burden" associated with pursuing objectives in ways that avoid unnecessary exclusionary impact is not an obviously heavy one, especially where the remedies for noncompliance are nonmonetary and prospective. See generally *Gebser*. And the claims by Petitioners and *Amici* that effects regulations threaten a vast intrusion into existing state prerogatives must be considered in light of the fact that Title VI regulations are binding only on those entities which freely chose to accept federal funds and which, as did Petitioners did here, give assurance that they will refrain from the practices proscribed by the agency rules. Thus, not only are federal fund recipients free to make their arguments concerning the "desirability" of the regulations to the political accountable branches, see *Chevron*, but they remain at liberty to decide for themselves that the "price" – complying – of federal funding is too high.

As for the assertions that a decision affirming the Court of Appeals will open litigation floodgates, the most powerful refutation is the fact that the very regulations predicted to have so destabilizing an effect have been on the books, unchanged, for nearly four decades (and have been held privately enforceable for almost that entire time). As Petitioners' *Amici* are constrained to concede, the number of lawsuits filed has been quite modest, and even those suits have met with only limited success (the most frightening prediction that the Washington Legal Foundation can fairly muster on the subject is that an affirmance in this case might be "expected" to lead to a "sharp uptick" in litigation under the regulations). WLF Br. at 24 n.8.

Nor do *Amici*'s professions of "difficult[y in] discern[ing]" how impact regulations "could be said to 'effectuate' the provisions of § 601," WLF Br. at 18-19, ring true. There is, of course, an obvious way to read the statute as supporting the regulations: the way the Court did in *Alexander* v. *Choate*. As has been summarized above, the circumstances surrounding Title VI's original enactment strongly suggest that Congress envisioned that, through operation of the regulations, the government would withhold funds based solely on the extreme and unjustifiable impacts of recipients' activities.

But under any circumstances, the assertion that a vast gulf separates the impact and intent standards is itself doubtful, and the link between "effects" regulations and intentional discrimination is not hard to discern. First, although it is a truism that "impact alone" is not the same as intentional discrimination, evidence of disproportionate burden will usually "provide [the] * * * starting point" of the Equal Protection inquiry, *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); see also *Washington* v. *Davis*, 426 U.S. at 254 (Stevens, J., concurring) ("When the disproportion is * * * dramatic* * * , it really does not matter whether the standard is phrased in terms of purpose or effect"), and there is a substantial

convergence between the two standards, in practice. See, *e.g.*, *Connecticut* v. *Teal*, 457 U.S. 440, 446-47 (1982) (plaintiff may prevail "if he shows that the employer was using the practice [having a disparate impact] as a mere pretext for discrimination"); *Watson*, 487 U.S. at 987.

Moreover, requiring that recipients refrain from practices for which there are obvious nondiscriminatory alternatives operates to deter and prevent the sort of taxpayer-funded, intentional discrimination that no one doubts to have been Title VI's core concern. See *Teal*, 457 U.S. at 449 (describing disparate impact as a "prophylactic" measure); *In re Alabama Employment Discrimination Litigation*, 198 F. 3d 1305, 1322 (11th Cir. 1999) (If "after a prima facie demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's use of the discriminatory practice?").

The effects standards also serve the important function of assuring that federal funds do not operate to aggravate, deepen, or "entrench," inequalities caused by intentional discrimination (either that of the recipient or a non-recipient third party). Cf. *Gaston County* v. *United States*, 395 U.S. 285 (1969). Thus, along the lines recognized by this Court in the Title VII setting, to fund practices "simply on the basis of their facial neutrality or on the basis of the [recipient's] lack of discriminatory intent" can "perpetuat[e] [– with taxpayer money –] the effects of pre-Act discrimination,"*Watson*, 487 U.S. at 988; see also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 806 (1973). (impact rules assure that earlier discrimination does not "work a cumulative and invidious burden on [minority] citizens for the remainder of their lives").

The results standards also effectuate another key objective of Title VI: Congress's strong preference for

consensual resolution. *See Gebser*; *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). As this Court has recognized in other settings, a discriminatory intent requirement can be inefficient and divisive, requiring those disadvantaged to cast aspersions on the motives of decision makers – often times stiffening that entity's resolve not to compromise.

Finally, the claims of incursion into State sovereignty and of executive overreaching – insubstantial as they are by their own terms – should carry even less weight with respect to Title VI. The statute is addressed to a subject – race and national origin discrimination – where the balance between local and federal power has shifted most decisively, see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Cannon*, 441 U.S. at 708, and where the central role of the Executive has been established through long practice. See *Bob Jones Univ.*, 461 U.S. at 593-95, 597-601 (1983).

CONCLUSION

For the reasons cited herein and in the Brief of Respondent Martha Sandoval, *et al.*, *Amici Curiae* respectfully submit that the judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF *AMICI CURIAE*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted LDF's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). LDF has litigated many cases under Title VI of the Civil Rights Act of 1964 and its implementing regulations, *see, e.g., Bazemore v. Friday*, 478 U.S. 385 (1986); *Alexander v. Choate*, 469 U.S. 287 (1985), and the outcome of this case will affect LDF's continued ability to ensure that federally-funded programs provide equal treatment for African Americans.

The Puerto Rican Legal Defense and Education Fund (PRLDEF) is a national civil rights legal organization dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos. PRLDEF has litigated many cases under Title VI of the Civil Rights Act of 1964 and its implementing regulations, including *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983). The resolution of this case will have a significant impact upon the extent to which PRLDEF and other civil rights organizations can protect the civil rights of their constituencies.

The Lawyers' Committee for Civil Rights Under Law was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes past presidents of the American Bar Association, past Attorneys General of the United States, numerous law school deans and many of the nation's leading lawyers. It has local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, DC. Through the

Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee is a tax-exempt, nonprofit civil rights organization. Among its essential interests is the proper construction and implementation of Title VI of the Civil Rights Act of 1964, as well as of the regulations that give life to the statutory promise of nondiscrimination in federally-assisted programs.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF has throughout its long history fought for the rights of equal access to government for its constituents. Title VI's disparate impact regulations and guidelines have been an important part of that advocacy. English-only services exclude many Asians and other immigrants from access to their government and from many services and benefits that are available to others.

The National Health Law Program (NHeLP) is a non-profit, legal support center that works on behalf of low income people, children, people with disabilities, and people of color. NHeLP has focused on problems limited English speaking individuals encounter when seeking health services. In addition to conducting research on this issue, NHeLP has filed administrative and judicial complaints on behalf of individuals who are seeking to enforce Title VI and its regulations.

The Center for Constitutional Rights ("Center") is a national, non-profit, legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution. Founded in 1966 during the Civil Rights Movement, the Center has a long-standing history of

assisting those people who, as a result of discriminatory policies, practices and effects, have been denied the rights, benefits, and privileges attendant to living in the United Sates. As part of its advocacy and litigation on behalf of those whose civil and constitutional rights have been violated, the Center has and continues to litigate cases under Title VI of the Civil Rights Act of 1964 and its implementing regulations.

The Center for Law in the Public Interest (CLIPI) in Los Angeles, California, was established in 1973 as one of the nation's first non-profit, public interest law firms. It is dedicated to policy-oriented litigation, counseling and advocacy, primarily in the areas of civil rights, education, environmental protection and land use, and consumer protection. CLIPI represents public-minded individuals, civil rights and other advocacy organizations, neighborhood coalitions, homeowner groups and environmental organizations. CLIPI has engaged in extensive advocacy and litigation under Title VI of the Civil Rights Act of 1964 and its regulations, and the outcome of this case will affect CLIPI's ability to ensure equal justice for all.